when competitors are just beginning to build competing networks and may be relying heavily on resale to enter the market.

Resellers will purchase retail services from LECs. They will not need to purchase transport and termination because that function already is included in retail telephone service. As the Notice recognizes, they also will not be entitled to collect access charges for interexchange services because those charges are levied separately on interexchange carriers and are not included in retail prices.[35/]

35/ Notice at ¶ 186.

The relationship among carriers that operate using one or all these alternatives can be summarized in a simple matrix.[36/]

IF A CARRIER SERVES AN END USER

	ENTIRELY VIA ITS OWN FACILITIES	**VIA UNBUNDLED ELEMENTS**	**VIA RESALE**
TRANSPORT AND TERMINATION	Obtains transport and termination under § 251(d)(2) cost standards, bounded on one side by long run incremental cost and on the other by bill and keep.		Depends on transport and termination arrangements of the underlying carrier.
UNBUNDLED ELEMENTS	Is not required to purchase any unbundled elements or any separate "interconnection" element.	Purchases unbundled elements under § 252(d)(1) cost standards, bounded on one side by TSLRIC and on the other by FDC.	Does not purchase any unbundled elements.
ACCESS (Note 1)	Is entitled to access charges for interexchange traffic that uses its network. (Note 2)		Does not receive access charges because it did not purchase the right to obtain them.

Note 1: This analysis is based on the current access regime. Cox makes no assumptions regarding the outcome of the Commission's proposed access reform proceeding. See, e.g., Notice at ¶ 165.

Note 2: This also would apply when traffic to a carrier's customers is routed to the carrier via interim number portability arrangements such as remote call forwarding. In such instances, the carrier that actually terminates the call should receive the access charges, not the carrier that forwards the call.

36/ A more detailed matrix of these relationships is attached to these comments as Exhibit 1.

B. The Commission Should Establish Pricing Boundaries for Each of the Three Market Entry Alternatives Contemplated by Congress.
(Notice Section II and Section III.)

In addition to imposing interconnection obligations necessary to promote the three alternatives for the provision of competitive local exchange service, Congress also established three distinct standards to govern the pricing or cost of services and facilities obtained from incumbent LECs under these alternatives. The Commission's interpretation of the 1996 Act in this proceeding must reflect the critical distinctions reflected in these standards. The Commission is required to do so under basic principles of statutory construction. Moreover, adopting differentiated cost standards is the best way to effectuate the direct preference for the development of facilities-based competition underlying the 1996 Act.

The cost standards established by Congress are contained in Section 252(d) of the 1996 Act. Specifically, Section 252(d)(3) requires incumbent LECs to offer services for resale at wholesale rates determined on the basis of retail rates less any avoided costs, such as marketing, billing and collection.[37/] Section 252(d)(1) provides that the incumbent LEC price for interconnection of facilities and for unbundled network elements must be "based on the cost . . . of providing the interconnection or network element" and "may include a reasonable profit."[38/] Finally, Section 252(d)(2) states that the rate for mutual exchange of traffic under a reciprocal compensation arrangement must provide for "the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on

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37/ 47 U.S.C. § 252(d)(3).

38/ 47 U.S.C. § 252(d)(1).

each carrier's network facilities of calls that originate on the network facilities of the other carrier" at a rate based on a "reasonable approximation of the additional cost of terminating such calls," which includes bill and keep arrangements.[39/]

In establishing the Section 252 pricing/cost standards, Congress made clear that the three standards are distinct and the Commission must respect those distinctions.[40/] The details of how the three standards are to be utilized in negotiations and arbitration is a matter that Congress intended the Commission to decide in this proceeding. The Commission has a critical role in setting the "rules of the road" for State arbitration of interconnection disputes. Specific national pricing policy facilitates some reasonable degree of uniformity in implementation across the States. Failure to articulate these distinct standards in sufficient detail will hinder the rapid development of competition as new entrants are forced to focus their efforts on resolving the same incumbent LEC cost issues in 50 States rather than building competitive facilities and bringing the benefits of competition to consumers. Cox wholeheartedly agrees with the Notice that the Commission should take the directives of the 1996 Act and provide the States with adequately detailed guidance.[41/]

By the same token, there is no need for the Commission to adopt rules that are so detailed that they preclude any variation from State to State. As described below, Cox proposes that the FCC set floors and ceilings on permissible incumbent LEC pricing that

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39/ 47 U.S.C. § 252(d)(2).

40/ See I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 430-32 (1987) (agency must conform to Congressional decision to adopt differing standards).

41/ Notice at ¶ 118.

reflect reasonable parameters on interpretation of the 1996 Act's pricing provisions. It further recommends that the Commission adopt specific cost proxies to be used as a default where it is difficult for a State to determine appropriate floor or ceiling costs.

The Commission's implementation efforts will prove successful if the Commission adopts an overall framework for the negotiation and arbitration process and sets parameters on acceptable outcomes of arbitrated interconnection disputes. It is critical, however, that this framework be in place very quickly, before arbitration begins. If the Commission fails to articulate a definite but flexible framework for negotiations and to articulate acceptable parameters, it may have to take action after the fact, on a case-by-case basis, to preempt State actions inconsistent with the 1996 Act. Such further delay and uncertainty benefits only the incumbent LECs and not the cause of facilities-based local competition.

The Notice is correct in its conclusion that the 1996 Act and the FCC's statutory duties under Sections 251 and 252 require that the FCC establish the details of cost principles so that the States can uniformly arbitrate disputes and the FCC may review BOC petitions under Section 271.[42/] This conclusion also is consistent with the principle that regulatory agencies are entitled to interpret their basic statutes.[43/]

Cox proposes a framework for cost boundaries that is suggested by the Notice's concept of developing cost ceilings and floors used to determine the rates for the services or functions that must be provided to requesting telecommunications carriers under the 1996 Act

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42/ Notice at ¶ 118.

43/ See Time Warner Entertainment v. FCC, 56 F.3d 151, 174-76 (D.C. Cir. 1995) (affirming Commission interpretation of provisions governing cable rates); see also Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

by incumbent LECs.[44/] Under the facilities-based entry models, a separate floor and ceiling for permissible prices is articulated.[45/] By using floors and ceilings in this fashion, the FCC can establish absolute boundaries that frame the debate with the incumbent LEC concerning relevant costs and prices during negotiations and, ultimately, arbitration.[46/] The Commission also should establish specific cost proxies for the additional costs of transport and termination and for the costs of unbundled elements. These proxies should be used when it is difficult for a State to establish an appropriate cost within the boundaries set by the Commission. Such an approach provides uniform guidance for negotiations and to the States, but does not dictate a precise result. A boundary approach preserves to the States their discretion within the arbitration process to choose the best pricing methodology by taking into account the specific conditions and circumstances in each State.

1. Cost Boundaries for Transport and Termination. The statutory cost standard for the transport and termination of traffic pursuant to a reciprocal compensation arrangement is plainly a forward looking incremental cost standard with no explicit additional profit element. In return for providing transport and termination to a new entrant, the incumbent LEC receives the reciprocal economic benefit of being able

TRANSPORT AND TERMINATION COST BOUNDARIES

- Forward-Looking Long Run Incremental Cost
- Bill and Keep

44/ Notice at ¶¶ 125, 134.

45/ The 1996 Act "avoided-cost" standard for resale contains no inherently obvious ceiling or floor.

46/ The Commission has correctly recognized that approaches based on ensuring recovery of the incumbent LEC's purported opportunity cost, such as the "efficient component pricing rule," would be inconsistent with the requirement of the 1996 Act and should not be permitted in State arbitration proceedings. Notice at ¶¶ 147-48.

to hand traffic to the new entrant for transport and termination on its facilities.[47] There is an exchange of value under this mutual arrangement, as opposed to the one way lease or sale transaction that takes place when a carrier purchases unbundled elements or purchases retail telephone services for resale.

The statutory pricing scheme reflects the difference between Section 252(d)(1) and (d)(2) by limiting incumbent LEC cost recovery solely to its "additional" cost for transport and termination. It is significant that Congress used the term "additional" cost, but also expressly acknowledged that a bill and keep regime (one in which each provider exchanges traffic for termination to the other's customer without charge) can be utilized by the parties or imposed by regulators as a reasonable approximation of these "additional" costs. This suggests that Congress well understood these additional costs to be extremely small. Translating the statutory standard into parameters for negotiation and dispute resolution by the States, Cox submits that the appropriate bounds are forward looking long run incremental cost ("LRIC") on one end and bill and keep on the other.[48]

In advocating LRIC as a parameter, Cox emphasizes that it is not equating LRIC with TSLRIC. While the Notice correctly suggests that, as a matter of economics, LRIC is the appropriate method of reflecting the cost — if any — of interconnection, it asks if LRIC and

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47/ The incumbent LEC also benefits because its customer is able to receive a call from the competitive LEC's customer.

48/ LRIC is the forward looking long run cost of any specific change in output. Here, it refers to the additional cost of the capacity necessary to accommodate a co-carrier's exchanged traffic. See Exhibit 2 (defining economic terms used in these comments); Exhibit 3, Statement of Gerald W. Brock, at 6-7 (describing meaning of "additional cost" in the context of exchange of traffic).

TSLRIC signify the same thing. There are distinctions between LRIC and TSLRIC that lead Cox to conclude that they are, in fact, different standards.

The most significant difference between LRIC and TSLRIC is that TSLRIC studies include *all* of the costs caused by a decision to offer a particular service. TSLRIC may include the total cost for all network parts or functions dedicated to the service as well as the volume sensitive costs of shared network parts or functions and overheads. In contrast, LRIC recognizes only the forward looking incremental costs of specific changes in output. In the case of reciprocal transport and termination, LRIC would recognize the cost of capital expenditures to provide the additional termination and transport required by a competitive LEC, maintenance on those facilities and depreciation on those facilities, without any allocation of overheads.[49/] While each methodology is forward-looking, TSLRIC studies will yield higher costs for individual elements of a service than LRIC.

It is plainly inappropriate for FCC rules or State policies to allow for the recovery of incumbent LEC overhead or common costs in the pricing of reciprocal transport and termination. It is also inappropriate, as the Notice recognizes, to include embedded incumbent network investments.[50/] Despite LEC claims of entitlement to "costs" that include their past network investments, the Notice correctly concludes that forward looking incremental cost is an appropriate place to begin looking for the specific cost of reciprocal

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49/ See Exhibit 2, Exhibit 3 at 6-7.

50/ See, e.g., Notice at ¶ 123 (discussing standards under Section 251(d)(1)).

transport and termination under the 1996 Act.[51] Indeed, there is no real economic debate that a forward looking LRIC is an economically sound pricing standard for the exchange of local traffic. Even BOC economists have advocated in State proceedings the economic efficiency of incremental cost pricing without overheads as a more rational method of interconnection pricing than embedded LEC cost or cost plus pricing.[52]

It particularly makes sense to develop strict reciprocal compensation parameters for State application in light of the presumptions in the statute that favor bill and keep arrangements. While the statute allows recovery of "additional" cost for reciprocal transport and termination, it expressly recognizes bill and keep as a reasonable approximation of these additional costs. For this reason, the cost parameters for transport and termination of local traffic should be LRIC and bill and keep. Applying these parameters, States can, as many already have, adopt bill and keep as an interim solution. Alternatively, a State can accept an incumbent's demonstration of its additional cost and, if that cost is no greater than LRIC, select it as the price for reciprocal transport and termination.

The Commission also should adopt bill and keep as the default cost standard for transport and termination when State commissions experience difficulty in determining the

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51/ As Dr. Brock observes in his attached statement, a proxy based on interstate access charges, with their fully distributed cost methodology, various mark ups and subsidy loadings would also be inappropriate for interconnection based on the "additional cost" standard.

52/ See e.g., Comments of SBC Corp., CC Docket No. 95-185 and Attachment A, Testimony of Jerry A. Hausman on behalf of Cellular One, Commonwealth of Massachusetts Department of Public Utilities, D.P.N. 94-185, May, 1995 at 5, 7 ("To promote economic efficiency, network interconnection rates should be set at long-run incremental [marginal costs] .... The Department should indicate its support for the principles of reciprocal compensation and interconnection based on incremental costs.")

appropriate costs for transport and termination. As noted above, many States already have adopted bill and keep as an interim compensation mechanism because it is a good approximation of the actual additional costs of transport and termination. Moreover, bill and keep arrangements mimic the results of reciprocal compensation arrangements when traffic is balanced. Finally, it is appropriate to use bill and keep as a default because it will give incumbents LECs better incentives to be forthcoming with information regarding their costs for transport and termination.[53/]

It should come as no surprise that Cox is a proponent of bill and keep for the exchange of traffic by peer networks. Bill and keep is an economically efficient method for interconnection of peer networks that advances the potential for facilities-based competition. As Cox has explained in the CMRS Interconnection proceeding, bill and keep is economically efficient either when traffic exchanged is in approximate balance or the costs for transport and termination (as compared to the cost of measurement and settlements) are extremely low.[54/] Moreover, the Congressional endorsement of bill and keep for the exchange of traffic is a recognition that the connection of local networks on an economic basis is to be encouraged, not discouraged through strategic uneconomic pricing by the incumbent.

53/ "The LECs are generally the ones claiming the right to net payments to them from the parties that interconnect with them. If the interim solution is more favorable to the LECs than the expected negotiated solution, then they will have an incentive to delay the development of data supporting their incremental cost claims." Exhibit 3 at 8.

54/ See Comments of Cox Enterprises, Inc., CC Docket 95-185 (filed Mar. 4, 1996) at 13, citing Gerald W. Brock, "Incremental Cost of Local Usage" (filed in CC Docket No. 94-54, Mar. 21, 1995).

When Congress adopted the 1996 Act, it had the real-world example of adjacent incumbent LECs who overwhelmingly exchange traffic with one another on a bill and keep basis.[55] The efficiency of this model speaks for itself as the carriers involved do not have to incur additional costs to measure traffic or do net settlements. The Commission should take account of these efficiencies and expressly recognize State arbitrations and review processes that result in bill and keep arrangements for reciprocal local transport and termination as within Section 252(d)(2)'s permissible pricing bounds.

In this connection, it also should be noted that there is no basis for distinguishing between the prices paid by adjacent and overlapping local exchange carriers for transport and termination.[56] The additional cost of reciprocal transport and termination does not vary depending on whether the source of the traffic is an overlapping or adjacent carrier.[57] The only reason for a LEC to charge an overlapping carrier more for transport and termination than an adjacent carrier would be to discourage competition. Moreover, Congress made no distinction between adjacent and overlapping local exchange carriers in Section 251(b)(5)

55/ One LEC, Ameritech, has used the 1996 Act as an excuse to attempt to renegotiate these arrangements to avoid having to offer bill and keep to new competitors. See Ameritech EAS Move May Alter RBOC-Independent Relationships, STATE TEL. REG. REP., Apr. 18, 1996 at 1.

56/ Notice at ¶ 230.

57/ It could be argued that adjacent carriers impose greater costs on incumbent LECs than competing carriers. Every increment of traffic generated by an adjacent carrier is traffic that would not otherwise have traversed the terminating carrier's network. On the other hand, given that incumbent LEC networks already are engineered to carry considerably more than 100 percent of the traffic in their service areas, there will be no additional cost incurred to carry traffic that originates on overlapping competitors' networks until overall usage of local exchange service significantly increases.

2. Cost Boundaries for Unbundled Elements. The pricing standard in Section 252(d)(1) relates to the interconnection and network elements that incumbent LECs are required to provide under Section 251(c)(2). Specifically, incumbent LECs are permitted to price these services "based on the cost . . . of providing the interconnection or network element" which "may include a reasonable profit." This cost plus profit standard reflects the expectation of a recovery of costs and profits on the costs from selling services or leasing facilities to a purchaser.

UNBUNDLED ELEMENT COST BOUNDARIES

- Fully Distributed Cost
- Total Service Long Run Incremental Cost

The Commission should create cost boundaries for unbundled elements that allow States to choose an acceptable pricing result within a range between Total Service Long Run Incremental Cost ("TSLRIC") and Fully Distributed Cost ("FDC").[58] Using these methods to bracket acceptable results allows the incumbent a price based on cost plus profit, thereby meeting the statutory standard. This relatively flexible boundary allows incumbents to recover overheads, profits and common costs for providing unbundled elements and interconnection for unbundled elements. It also permits some States to determine that recovery of some element of incumbent LEC embedded costs is appropriate, while allowing other States to exclude some or all embedded costs.

A cost plus profit standard for incumbent LEC network elements and interconnection for the provision of those elements is not only required by Section 252(d)(1); it also is consistent with the overall framework of the 1996 Act. In order to provide network

58/ The definitions of these terms are contained in the glossary of economic terms that is attached hereto as Exhibit 2.

elements, an incumbent LEC is leasing a portion of its network to another carrier to enable that carrier to provide its services. The only benefit the incumbent derives from this relationship is the revenue it receives for the sale of the unbundled element and of the interconnection for use of the unbundled element. It is reasonable to allow the incumbent to recover cost plus profit where the sale of its services or lease of its facilities is the only economic benefit it receives. The cost standard for unbundled elements differs from the standard for reciprocal transport and termination, however, because the latter reflects mutual benefits.

Just as for reciprocal transport and termination, the Commission also should adopt a cost proxy to be used by State commissions when it is difficult to determine the appropriate, actual costs for unbundled elements. Any proxy the Commission chooses, such as the Benchmark Cost Model or the Hatfield TSLRIC Study, should permit calculation of the costs of unbundled elements from readily-available data.

It should be noted that the use of different cost standards for reciprocal transport reciprocal and termination and for unbundled elements does not create any risk of arbitrage. As described above, reciprocal transport and termination and particular unbundled elements are distinct from one another and cannot be substituted.[59/] While it is likely that the use of different cost standards will create an incentive for carriers to provide service through their own facilities, that is what Congress intended and is not by any means an accident.

59/ See supra Part II(A). In addition, there will be no unbundled element equivalent to transport and termination, so there will be no opportunity for arbitrage.

3. <u>Pricing for Incumbent LEC Resale</u>. The reciprocal benefit relationship between carriers exchanging traffic is not reflected either in the nature of the relationship between an incumbent LEC and a reseller or in the standards contained in Section 252(d)(3) to define acceptable pricing for resale. Resale pricing is governed principally by incumbent LEC retail pricing and not by either the cost-based model used for the leasing of incumbent facilities under Section 252(d)(1) or the arrangements for mutual compensation between co-carriers under Section 252(d)(2). Given the express policy preference in the 1996 Act for the development of facilities-based competition, this is hardly surprising.

RESALE PARAMETERS

- Retail Baseline
- Limited Discounts Imposed on Incumbent LECs

The resale pricing standard for incumbent LECs is their retail service rate less "avoided" costs. State regulators are in a position to judge categories of costs LECs can avoid by resale. However, while there is no direct relationship between avoided costs and the standards for unbundled elements and traffic transport and termination, the setting of a margin or discount for resale will have a substantial impact on the build out of facilities that the 1996 Act so plainly prefers. For this reason, Cox suggests that substantial discounts off retail rates are neither achievable under Section 252(d)(3) nor even desirable as a public policy.

There also is no need to adopt a default mechanism for pricing resale of incumbent LEC services. There is no readily available proxy that properly accounts for the variations in avoided costs, such as marketing, among various basic and optional incumbent LEC services.

C. **The Pricing Standards Are Not Cumulative.** (Notice Sections II.B.2 and II.C.5.)

The three pricing standards contained in Section 252 are not cumulative. A particular service or function provided by an incumbent LEC is governed under one of the three standards, not two or more of the standards. Section 252(d)(1), which governs interconnection and unbundled network elements, applies only when a competing carrier is leasing or purchasing incumbent LEC facilities or services to supplement its own facilities or services — for example, when the competitor provides its own switch and fiber backbone but must interconnect to the incumbent LEC to lease unbundled loops. Section 252(d)(2), by contrast, applies when both carriers originate "local" calls on their network facilities and terminate calls on the other carrier's network pursuant to a reciprocal compensation arrangement that provides for the mutual exchange of traffic. Whether one or both networks are using leased facilities to complete their networks is irrelevant; what matters is that both networks must be capable of originating and terminating traffic to end users. Section 252(d)(3), in turn, applies when the competing carrier simply resells the incumbent LEC's local exchange service. Because what is being provided is distinct, there can be no confusion related to what a new entrant is obligated to pay.

The statute creates no ambiguity on the point of overlap in the Section 251(c)(2) term "interconnection" and the requirement that incumbent LECs establish reciprocal compensation arrangements for the "transport and termination" of local telecommunications under Section 251(b)(5).[60/] Interconnection, as used in Section 251(c)(2), refers to the incumbent LEC's duty to provide physical connections to the LEC network of "the facilities and equipment" of the requesting carrier "for the transmission and routing of telephone exchange service and exchange access."[61/] The interconnection requirement of Section 251(c)(2) is placed only on incumbent LECs, an acknowledgment that incumbent LECs have stymied potential competitors who must rely on the incumbent to provide interconnection in order to expand their competitive offerings.

The obligation to pay reciprocal compensation for transport and termination of telecommunications, however, applies to all LECs, and is linked directly to the specific pricing standard in Section 252(d)(2). The reason Congress distinguished between interconnection of facilities and transport and termination of traffic is that transport and termination is a reciprocal obligation placed on co-carriers, while interconnection and associated charges for interconnection are intended to be a one-way purchase of network services or lease of network elements with no reciprocal obligation. The requirement that a competing carrier will pay a rate for transport and termination when mutually exchanging traffic with an incumbent that is lower than the rate another carrier pays for use of transport as an unbundled network element reflects this additional reciprocal termination obligation which is imposed only on carriers originating local traffic.

60/ Notice at ¶ 54 (indicating that the 1996 Act does not require overlap between Section 251(b)(5) and Section 251(c)(2)).

61/ 47 U.S.C. § 251(c)(2).

This non-cumulative, "carrier only pays once for what it uses" approach makes sense. If, for example, an interexchange carrier purchases unbundled elements to build its local network, it will pay the incumbent for interconnection and network elements under Section 252(d)(1) for those services. Once the interexchange carrier has paid the incumbent for the network elements and associated interconnection, it is entitled to termination and transport of its local traffic from the incumbent under the pricing standards of Section 252(d)(2). Under this approach, there is no possibility that the lines between resale, network elements and transport and termination will blur or, as discussed above, that an arbitrage problem will be created.

This approach also will ease administration of the requirements of Section 251. Maintaining distinct boundaries between reciprocal transport and termination under Section 251(b)(5) and the purchase of unbundled elements under Section 251(c) will greatly reduce the potential for confusion by incumbent LECs and other carriers as they undertake negotiations and arbitrations under Section 252. If the Commission blurred the boundary between Section 251(b)(5) and Section 251(c), contrary to the statute's language and Congressional intent, then there would be a significant potential for disputes between incumbent LECs and new entrants regarding whether new entrants would be required to purchase specific unbundled elements (and which elements would have to be purchased) to reciprocal obtain transport and termination. At the same time, permitting carriers to obtain what they need (whether simply transport and termination, resale or a combination of unbundled elements and transport and termination) will simplify the process of entering the local telephone marketplace, to the benefit of both new entrants and consumers.

III. THE COMMISSION SHOULD ADOPT RULES TO REQUIRE BILL AND KEEP COMPENSATION FOR RECIPROCAL TRANSPORT AND TERMINATION DURING THE PENDENCY OF NEGOTIATIONS BETWEEN NEW ENTRANTS AND INCUMBENT LECS. (Notice Section II.C.5 and Section III.A.)

A. Bill and Keep Is a Fair and Equitable Compensation Method as Recognized by Industry Practice and the 1996 Act. (Notice Section II.C.5 and Section III.A.)

Bill and keep is well documented as being the dominant compensation mechanism for co-carriers in the current environment. Claims by LECs that the adoption of bill and keep is contrary to the public interest and that it will harm competition and public access to the telephone network[62/] are attempts to obscure the fact that bill and keep has been used widely for years by incumbent LECs as a co-carrier compensation method for exchanging traffic. Washington State, for example, recognized in its interconnection proceeding that incumbent LECs employ bill and keep compensation for the exchange of local traffic.[63/] Ameritech made headlines when it recently informed all interconnecting independent telephone companies in its five-state midwestern region of its intent to revise its "historic" bill and keep arrangements rather than face the prospect of those arrangements becoming available to

62/ See, e.g., Reply Comments of Bell Atlantic, CC Docket No. 95-185 (filed March 25, 1996) at 6-9 (asserting that a zero bill and keep interconnection charge for LEC-to-CMRS interconnection would cut off revenues necessary for LECs to support the provision of universal service to their telephone ratepayers).

63/ Washington Utilities and Transportation Comm'n v. U S West, Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints, in Part, Docket No. UT-941464 et seq., at 40 (Washington Util. & Transp. Comm'n, adopted October 31, 1995) ("Washington UTC Order") new competitors.[64] If bill and keep were truly harmful it would not have been used for decades as a permanent method of co-carrier reciprocal compensation by adjacent LECs. Indeed, the incumbent LEC objections to bill and keep appear to stem mainly from their obvious reluctance to split the local telecommunications pie. Congress, however, has already spoken on this subject.

Adoption of bill and keep on an interim basis during the Section 252 negotiation process would constitute nothing more than formal Commission recognition of a common industry practice of interconnection compensation between local exchange co-carriers. Indeed, two-thirds of the States that have addressed local interconnection issues have established bill and keep arrangements on an interim basis. To date, Arizona, California, Connecticut, Florida, Iowa, Michigan, Oregon, Tennessee and Washington all have adopted some form of bill and keep.[65]

Bill and keep also should be considered per se reasonable because bill and keep is expressly permitted by the 1996 Act.[66] Bill and keep is specifically featured in the 1996 Act as an appropriate option for traffic exchange between co-carriers because it reasonably approximates the additional cost of terminating traffic over incumbent LEC networks.[67]

64/ Ameritech EAS Move May Alter RBOC-Independent Relationships, STATE TEL REG. REP. (April 18, 1996) Vol. 14, No. 8 at 1.

65/ See Notice at ¶¶ 227-229, 240 (listing several States).

66/ See 47 U.S.C. § 252(d)(2)(B)(i).

67/ See Reply Comments of Cox Enterprises, Inc., CC Docket No. 95-185 (filed Mar. 25, 1996) at 20.

Because Congress expressly approved the adoption of bill and keep on a permanent basis, adopting it on an interim basis is reasonable and consistent with Congressional intent.

B. The Commission Has the Authority to Specify a Compensation Mechanism to Be Used While the Section 252 Processes Are Pending. (Notice Section III.A.)

Even if bill and keep were not already a common method of local co-carrier compensation and were not explicitly recognized as appropriate by Congress, the Commission would still have the authority to adopt bill and keep as the interim compensation mechanism to be used while the Section 252 processes are pending.

Section 4(i) of the Communications Act gives the Commission the authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Courts have held that Section 4(i) gives the Commission the authority to establish interim rates. For example, in a case where the Commission's authority to establish interim rates was questioned, the court Stated that:

> The Commission's use of its section 4(i) power in this situation and in this manner was both helpful and necessary to the execution of its function. If it were otherwise, the IRCs [international record carriers] would have every incentive to refuse to negotiate with WU and to delay the resolution of the ratemaking process for as long as possible in order to keep the benefits of the lower, expired contract rates. Therefore, we hold that under section 4(i) the Commission had authority to establish an interim rate until a final rate could be prescribed.[68]

68/ TRT Telecommunications Corp. v. FCC, 857 F.2d 1535, 1543 (D.C. Cir. 1988) ("TRT Communications") citing FTC Communications, Inc. v. FCC, 750 F.2d 226, 232 (2d Cir. 1984). See also Lincoln Telephone & Telegraph Co. v. FCC, 659 F.2d 1092 (D.C. Cir. 1981).

Today, incumbent LECs have similar incentives as the IRCs did in 1987 to stall the pro-competitive process. They continue to have monopoly market power over the local market and a demonstrated unwillingness to extend the obvious benefits of a proven, reasonable reciprocal compensation method to new entrants. Thus, establishing bill and keep as the interim compensation mechanism for reciprocal transport and termination during the Section 252 negotiation process is entirely within the Commission's Section 4(i) authority.

As recognized by the majority of States that have addressed the issue, bill and keep is an administratively simple solution that begins the long delayed process of competition.[69/] The Commission itself recognized in the Notice that it "might be desirable to establish an interim rule (such as bill and keep) . . . [because an interim rule] could permit new competitors to enter the market more quickly, equalize bargaining power between new entrants and incumbent LECs, and reduce the incumbent's incentive to stall negotiations."[70/] An interim rule of mutual compensation is desirable for exactly the reasons the Commission listed in the Notice. These reasons are the same reasons the courts have used to uphold the Commission in prescribing interim rates in other contexts.[71/]

Adoption of interim bill and keep fully satisfies the Congressional intent for expeditious introduction of facilities-based local competition. The FCC has the requisite power under 4(i) to order bill and keep compensation for reciprocal transport and

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69/ See, e.g., Comments of Cox Enterprises, Inc., CC Docket No. 95-185 (filed March 4, 1996) at 5-9 (discussing how the States that have considered mutual compensation have adopted some form of bill and keep by a two to one margin).

70/ Notice at ¶ 244.

71/ See TRT Communications, 857 F.2d at 1543.

termination. It should do so because it has a well developed record that: (1) bill and keep will speed the onset of local competition; (2) it is a fair economically efficient method of compensation; (3) it will provide the new entrant negotiator under Section 251 with badly needed leverage to achieve a reasonable agreement with the incumbent LEC; (4) it is administratively simple; and (5) it has been adopted on an interim basis by the majority of the States which have undertaken rulemakings to introduce local competition. Accordingly, the FCC should require bill and keep during the pendency of negotiations between new entrants and incumbent LECs.

IV. THE TECHNICAL REQUIREMENTS FOR CONNECTIONS BETWEEN CARRIERS MUST BE NON-DISCRIMINATORY AND REASONABLE.
(Notice Sections II.B.2 and II.C.5.)

In addition to establishing appropriate incumbent LEC cost guidelines for network interconnections under Section 252, the Commission also must establish appropriate guidelines to govern the technical aspects of these interconnections. Cox supports the Commission's tentative conclusion that a reasonably uniform set of technical interconnection rules will facilitate entry by competitors in multiple States by removing the need to comply with a multiplicity of different technical and procedural requirements.[72/] Technology does not vary from State to State, and while the specific technical requirements for interconnection may vary from carrier to carrier, lack of explicit guidelines will slow negotiations and impair a State's ability to complete arbitration within the statutory time limit. The Commission

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72/ Notice at ¶ 50.

must not, however, adopt rules that freeze technology and prevent new entrants from effectively competing with incumbent LECs.

The 1996 Act requires all carriers to interconnect in a non-discriminatory, technically feasible manner.[73/] LECs have a duty to establish reciprocal compensation arrangements for the transport and termination "of telecommunications.[74/] Incumbent LECs have additional obligations to provide interconnection on an unbundled basis to other telecommunications providers at any technically feasible point within their networks that is at least equal in quality to that which they provide to themselves and their affiliates.[75/]

In light of these statutory non-discrimination requirements, the Commission should adopt rules that require, at a minimum, that incumbent LECs connect with other providers on any technical terms that are now in place with other LECs, including all LEC affiliates. Because these technical arrangements govern such a high volume of calls, and are between affiliated companies, their terms are likely to incorporate the best technology. Requiring incumbent LECs to offer interconnection to all carriers on the same technical terms and

73/ See 47 U.S.C. §§ 251(a), 256.

74/ 47 U.S.C. § 251(b)(5).

75/ 47 U.S.C. §§ 251(c)(2) and (3). By imposing less onerous interconnection obligations on non-incumbent LECs in Section 251(b), Congress acknowledged the importance of interconnection to the development of a national network of networks, but also realized the relative inability of non-incumbents to harm the growth of interconnectivity through abuse of the negotiation process. In contrast, Congress plainly intended to impose additional interconnection obligations on incumbent LECs in Section 251(c) in recognition of the incumbent LEC position as a monopoly gatekeeper. See infra Part VI(A).

conditions offered to their affiliates would promote competition and is consistent with the non-discrimination requirements imposed by Congress

Existing technical terms should, however, set the minimum and not the maximum extent of incumbent LEC obligations. Adoption of existing technical standards as a floor permits the Commission to establish minimum standards quickly, thereby allowing the establishment of an expeditious dispute resolution process to determine whether requested interconnection points and technical arrangements are "technically feasible" under Section 251(c)(2)(B). At the very least an incumbent LEC must offer interconnection upon request to any carrier at any point where it allows interconnection to either itself, its affiliates, or other carriers. Cox agrees with the Commission that, in a dispute, the burden should be on the LEC to prove why a request is not feasible.[76]

The Commission need not, and should not, determine now what is and is not technically feasible interconnection because of the risk that any dictated standard could soon become technically obsolete. As technology evolves, new entrants may well require access to portions of the incumbent's network in ways that previously were unavailable or undesirable.

Finally, Cox endorses the concept, articulated by Teleport, that interconnection agreements should contain minimum technical performance standards that give incumbent LECs an explicit, enforceable obligation to cooperate, to deliver circuits, to provide access to rights-of-way and to maintain acceptable service intervals so new entrants are not hamstrung

76/ See Notice at ¶ 58.

by incumbent LEC service degradation.[77] Agreements on minimum standards ensure no carrier's customer is delivered service that is below a specific quality threshold.

V. THE COMMISSION SHOULD ADOPT PROCEDURAL REQUIREMENTS FOR SECTION 252 NEGOTIATIONS THAT CREATE INCENTIVES FOR GOOD FAITH NEGOTIATION AND FAIR DECISIONS BY STATE REGULATORS. (Notice Section II.B.1 and Section III.A.)

It is important that the Commission adopt pricing boundaries and minimum technical standards for the exchange of traffic and purchase of services under Sections 251 and 252. It is equally important to adopt procedural requirements for State consideration of issues that arise in the negotiation process. Specific Commission requirements will ease negotiations by making the outcomes of arbitrations more predictable and limiting the incentives of any party to game the negotiation process. One way in which the Commission can aid the States is by permitting them to adopt interim compensation arrangements while they determine the additional cost incumbent LECs incur for reciprocal transport and termination and the proper charges for unbundled elements.

A. States Should Be Permitted to Adopt Interim Rates for Services Offered Under Section 251(c) and Bill and Keep for Mutual Transport and Termination Between Co-Carriers Under Section 251(b)(5). (Notice Section III.A.)

Giving States the latitude to establish interim structures for LEC-to-CLEC call termination within FCC-established bounds will produce several pro-competitive benefits. First, providing for an interim procedure will enable State regulators to stimulate new entry

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77/ See Teleport Communications Group Issue Paper, "Performance Standards Key to Interconnection," April 1996.